tions of the business community as well as 'several government departments and the Government's Business Regulations Review Unit'. However the *Sydney Morning Herald (SMH)* pointed out in an article on 30 September 1989 that:

> Departments such as Finance appear to have mellowed in their opposition, belatedly seeming to recognise the economic efficiencies of allowing plaintiffs to combine their actions.
>
> Treasury has adopted the regulatory position which limits courts actions to one plaintiff at a time, even in circumstances essentially the same, rejecting the economically more rational position that parties ought to be free to combine into whatever groups they choose. Similarly, the business regulation review unit, still part of the Department of Industry, Technology and Commerce, is opposing.
>
> Most other departments seemed to have accepted the old lawyers adage that your rights are as good as your remedy. For most consumers the high cost of litigation has meant that, in practice, the courts have become the sole province of the rich, the government and large corporations.

the end of civilisation as we know it. The *Herald* points out that the Business Council and the Confederation of Australian Industry have claimed that Senator Bolkus is rushing his submission through and states one of the reasons they are against the proposal is that 'there has not been enough consultation'. However the *Herald* points out that the ALRC has held public hearings and issued discussion papers and has been holding consultations for twelve years 'after twelve years no one could claim there has not been enough consultation'. The *Herald* article goes on to say:

> Their argument is in the 'end of civilisation as we know it' category. Relying on the US experience as evidence, they say the proposals will lead to a huge increase in litigation and insurance premiums. Strangely they then contradict themselves and say there is no evidence of any need for the changes.
>
> To prove it is a consumerist plot to cripple business with huge damage claims and insurance premiums, the BCA and CAI retained some consultants to try to discredit the Commission's costings, which showed the cost impact would be relatively small. The BCA/CAI analysis came up with a variety of figures ranging from 1.1 billion dollars to around 2 billion dollars a year depending on what methodology is used.
>
> They may as well have picked the figure out of a lucky dip. Citing such objective sources as the insurance industry, the consultants decided that the initial impact of the changes would be to increase insurance premiums by 10%. In a very arguable calculation, they determine Australia's national premium rate to be at 0.22% of all insurable industry activity ($400 million) compared with the US where they say it is between 3 to 5%.
>
> Despite an admission that forecasting the impact of the new proposals will be is 'extremely speculative' they *assume* the changes will leave Australia with a national premium rate of a quarter that of the US, about one percent, or five times the current rate. In total, about $2 billion based on a finger in the air assumption. Just straight guess work.
>
> No attempt was made to quantify the effect that the signficant differences between the US and Australian legal system would have on the impact of the changes. No mention of that document the American's call the Bill of Rights. Nor that the US system allows triple damages, and that the Commission specifically ruled out contingency fees being fixed as a percentage of any damages awarded, as is the case in the US. □

reform of product liability laws

> . . . the most enlightening judicial policy is to let people manage their own business in their own way.
>
> Oliver Wendell Holmes,
> Dr Miles Medical Co v Park & Sons

In September 1987 the Commonwealth Attorney-General referred the question of product liability laws to the ALRC. The VLRC was given a companion reference soon afterwards and the two Commissions worked together to produce a single report with complementary recommendations. This report, *Product Liability* (ALC51/VLRC27), was tabled in the Commonwealth Parliament on 15 August 1989. It includes draft legislation which would amend the Trade Practices Act 1974 (Cth) by inserting a new Part VA. The Victorian Commission recommends amendments to the Fair Trading Act 1985 (Vic).

policy approach. Previous reports dealing with compensation for loss or damage caused by goods, like those of the Law Commission in England and the Law Reform Commission of Ontario, and other initiatives for reform, like those of the EEC and the Council of Europe, have taken a traditional view of the place of compensation laws. Such laws should provide both:

- incentives to produce safer goods; and
- a mechanism for cost spreading and loss distribution.

The major cause has been whether the basis of liability should require proof of 'fault'. The Commissions' references did not extend to consideration of comprehensive compensation schemes — whether covering all types of accidental, and some other, illnesses and injury, as in New Zealand, or compensation schemes of a more limited kind, as with the road accident and occupational injury schemes now operating in several parts of Australia — which provide benefits determined administratively, without the need for the injured person to prove 'fault'. Advocates of those schemes have criticised the traditional approach as perpetuating expensive court-based dispute resolution mechanisms. The Commissions' approach is completely different. The report deals only with compensation laws, and making these as efficient (in economic terms) as possible. It does not aim primarily at product safety, but seeks to promote an efficient means of providing compensation to persons who suffer loss caused by goods.

policy objectives. The report suggests that the basic policy underlying the laws that govern entitlement to compensation for loss and injury caused by something goods do should be that

> those who manufacture and supply goods — and through them, their customers, who use and enjoy the goods — should bear the risk of losses caused by what the goods do. The risks of losses caused by goods should be 'matched' with the benefits derived from those goods, so that those who benefit pay the full cost of their benefit.

This principle flows from the argument that manufacturers and suppliers are in a much better position than their customers to assess the risk of whether or not goods will cause loss. They must decide the extent to which they will build into their goods features that will reduce the risk of losses the goods might otherwise cause. It also follows that manufacturers and suppliers, and through them, their customers, should bear the cost of all losses caused by something their goods do. Manufacturers and suppliers must not, however, be compelled to pay for losses not caused by something the goods did. Only if the law imposes liability on a very clear and certain basis, known in advance, can it provide incentives to make decisions that lead to the *optimal* level of safety or quality of goods. The optimal level is that level of safety or quality at which the marginal cost of adding the next loss preventing feature to the goods is the same as the marginal cost of the losses the feature is

designed to prevent. The proper pricing of goods is essential to this policy. Manufacturers and suppliers should price their goods to reflect *every* cost component. The cost of losses caused by goods is just as much a component as is the cost of raw materials and labour. A further policy objective is cost containment, because this is an essential part of the *efficient* delivery of compensation. A different basis of liability will not directly reduce the amount of loss or damage caused by something goods do or the amount of compensation that must be paid as a consequence. It will simply rearrange how that loss is borne. If it provides sufficient incentive for the taking of more loss-preventing measures, it may reduce the total amount of loss or damage, but this effect is *indirect.* However, the recovery of compensation does entail its own costs: the cost of investigating the claim, preparing the case, attending court, finding witnesses, and especially court fees and legal costs. These costs, often referred to as 'transaction costs', can and should be reduced as much as possible.

characteristics of a good product liability law. The policies outlined above suggest that a good product liability law should have the following characteristics:

- it should ensure that those who manufacture and supply goods — and their customers, who use and enjoy the goods — bear the risk of losses caused by what the goods do
- full account should be taken of other causes of those losses, and
- it should provide the cheapest, most efficient means of determining compensation claims.

The present law does not meet these criteria. A major and central criticism of the existing law is that neither negligence nor the strict liability approach of contract and the Trade Practices Act 1974 (Cth) Part V, Division 2A are satisfactory bases of liability. Both, the Commissions argue,

- automatically exclude from obtaining compensation some people who suffer loss through no fault of their own, with the result that proper risk matching does not occur
- purportedly produce a 'standard' concerning the behaviour of manufacturers and suppliers or the condition of the goods they produce and distribute, but in reality are vague and indeterminate, and thus do not determine liability clearly, and generally produce inefficient allocation of resources by manufacturers, suppliers and consumers of goods.

It follows from this criticism that an entirely new basis of liability is required, not merely a reworked version of negligence or strict liability. In addition, the particular content of laws varies from State to State.

national law proposed. The ALRC recommendations for amendments to the Trade Practices Act 1974 (Cth), to achieve a largely national law on product liability, as advocated in virtually all submissions. The recommended Victorian legislation would complement the federal legislation and the report suggests that the other States also enact complementary legislation.

basis of liability. Under the proposals, a person has a right to compensation if

- that person suffers loss or damage
- the loss or damage was caused by the way goods acted, and
- the goods were manufactured or supplied by a corporation in trade or commerce

The report rejects the need to prove a further element, such as that the goods are

'unsafe' or 'defective', despite proposals in an earlier Discussion Paper for such a requirement. The report argues that such 'standards' are in fact not standards at all and that they have other unsatisfactory features as well, because

- they are vague and indeterminate
- breach of the standard is determined after the event, by a court, with the benefit of hindsight
- the courts give these vague and uncertain 'standards' content within the context only of the particular case at hand. How they do so cannot be predicted accurately, but that process may involve certain unstated policies. It is Parliament's role to establish and express in the law the policy which determines how such decisions should be made
- the courts are ill-suited to determine policy matters concerning the commercial environment faced by manufacturers, suppliers and consumers of goods; the availability of alternatives, price and consumer preferences
- whether a defendant or particular goods complied with a standard is decided by the court *only if the goods have in fact caused loss*: this is a fact to be taken into account in determining whether or not the standard has been breached. There is a logical problem
- unpredictability in the operation of general standards increases with uncertainty. As the discretion of the court in determining whether or not the standard has been breached becomes more extensive, the operation of standards that are already vague and unclear become even more unpredictable.

defences. There will be no right to compensation if

- what the claimant knew about the goods before the loss or damage occurred would have enabled a reasonable person to assess the risk that the goods would act as they did
- when the goods were first supplied by retail, it could not have been discovered, using any scientific or other technique then known or in any other way, that the goods could act in the way that they did, or
- the goods acted as they did only because they, or a person involved in their manufacture or supply, complied with a mandatory standard applicable by law to the goods.

calculating the amount of compensation. Account must be taken of other factors that caused the loss. The draft legislation contains a detailed provision concerning the calculation of the amount of compensation payable to a claimant. The total amount of the loss is reduced, if necessary to nil, by amounts that represent the part or parts of the loss that were caused by

- an act of the claimant or
- an act of some other person (who is not involved in manufacture or supply of the goods) or
- something independent of human control.

This amount is further reduced, if necessary, to take account of the degree of unreasonableness of

- an act of the claimant or of a third party or
- advice to use, or about how to use, the goods

that increased the risk that the goods would cause the loss.

identifying a defendant. To overcome problems of identifying a defendant encountered in negligence actions, the report

recommends that a specific person in the chain of manufacture and supply be identified as the person to be sued by a person who has suffered loss. This should be the person who is in the best position to identify the person or persons involved in the manufacture and supply of goods whose acts caused the goods to act as they did. It is normally the manufacturer of the goods, but there are exceptions

- if the goods are imported, the importer is also to be liable
- if the manufacturer cannot be identified, a supplier of the goods is to be liable if, within a reasonable time after a request for the information, it does not identify the manufacturer or a previous supplier
- if the only remedy sought is repair or replacement of the goods or a refund of the price, existing rights against a retail supplier are to be preserved.

The term 'manufacturer' is defined in the same way as in the Trade Practices Act 1974 (Cth) Pt V, Div 2A. The goods covered by the proposals are all corporeal chattels except human blood and tissue and electricity. They include goods affixed to land or buildings, but a building is not itself 'goods'. The proposals are not confined to 'consumer' transactions, but certain businesses may contract out the operation of the proposed laws (see below). Who is the the proper defendant will depend on how the relevant goods are identified: for example, if the claimant identifies the goods as a car, the proper defendant would be the manufacturer/assembler of the car, but if the goods are identified as the transmission of a car, the proper defendant would be the manufacturer of the transmission.

contribution and indemnity. The manufacturer or importer is nominated as defendant to represent all persons involved in the manufacture and supply of the goods. It is usually in a better position to identify which of those persons will ultimately be liable. The report recommends that the representative defendant may recover indemnity or contribution from others involved in the manufacture and supply of the goods

- whose acts caused or contributed to the way the goods acted or
- who supplied a component part that acted in a way that caused or contributed to the way the goods acted.

The statutory scheme of contribution may be excluded by agreement between the parties, but such an agreement is subject to a fairness test which requires consideration of the relative bargaining positions of the parties to the agreement.

notice before action. The report recommends a pre-claim notice procedure which requires the intending claimant to serve on the prospective defendant a verified notice of the circumstances of the claim and other relevant matters, so far as he or she knows about them, before proceedings are commenced. This procedure will discourage fraudulent and spurious claims and promoting negotiated settlements of claims where issues of fact are not disputed.

what losses may be compensated? Compensation under the recommended changes in the law should be available for the following types of loss:

- economic and non-economic loss arising from personal injury, disease or death
- economic and non-economic loss arising from loss of or damage to property in which the claimant had a proprietary or possessory interest
- pure economic loss caused by the action (or inaction) of goods in which the claimant had a proprietary or possessory interest.

Compensation may also be claimed by a person who, under some other law, is liable to pay money to another person for such loss or damage. For reasons of cost, the proposals do not extend to loss or damage arising out of or in the course of employment.

further review of damages needed. The report does not recommend any limits on the amount that may be recovered as compensation, whether for economic or non-economic loss. However, it notes several anomalies in the present rules concerning assessment and payment of damages and recommends a review of the law of damages generally. This should consider such questions as the desirability of damages for non-economic loss and alternatives to the 'once and for all' assessment and lump-sum payment of damages.

exclusion or restriction of liability. The report recommends that exclusion or restriction of liability under the proposed scheme should generally not be permitted. However, it is recognised that businesses which supply goods to other businesses for business purposes should be at liberty to exclude or restrict the general rules subject again to a fairness test.

an exclusive remedy. The statutory cause of action should generally constitute the sole right to compensation for loss against those involved in the manufacture and supply of the goods where, in order to obtain compensation, it is necessary to prove how the goods acted. This is necessary to achieve the basic risk matching policy, and especially to minimise costs, by reducing multiple claims, multiple causes of action and multiple parties where this is possible. There are three exceptions to this general rule:

- The recommended scheme does not affect rights to claim compensation for the cost of repair of replacement of goods, or a refund of their price.
- To the extent that rights created by a law giving effect to Australia's international obligations are inconsistent with the recommended scheme, those rights rights should prevail.
- The scheme should not apply where a person has rights to benefits under workers compensation laws.

The report is concerned with providing compensation. Therefore, no extension of laws providing for other remedies, such as injunctions, are recommended. For similar reasons, the report recommends that exemplary damages should not be available. The criminal law, which is not affected by the proposals, provides proper safeguards, and should be relied upon where punishment is to be inflicted.

limitations and repose. The report recommends a uniform limitation period of 3 years for both compensation claims and contribution actions. A discovery-rule formulation is recommended for determining the point from which time runs for compensation claims. Courts will have a discretion to extend the 3 year period. (No statute of repose, or absolute time bar, is recommended.)

enforcement of judgments against corporations. The report recommends that, if a judgment against a corporation is not satisfied within 60 days, it should be enforceable against a holding company. The proposal in an earlier Discussion Paper, that unsatisfied judgments should be enforceable against directors, is not pursued. However, the report suggests that there should be a review of means to counter abuse of the corporate form.

the future. The report, which is now in government hands, will generate much debate, not least because of its novel approach to the issue of product liability. In his budget speech, the Treasurer indicated that the economic aspects of the proposals would be referred to the new Industries Commission. The Commissions are quite satisfied that the legal and economic principles of the recommendations are correct, and will stand the most intense economic scrutiny. They argued in the report that a detailed cost-benefit analysis was not possible, but admitted that their resources permitted only a limited economic study. They consider that further economic analysis would support their recommendations. It might be expected that in the coming months there will be some intense lobbying by interests in favour of, and opposed to, its recommendations, as the federal and Victorian governments consider the recommendations. The insurance industry, naturally, has been cautious in its approach to the proposals, but the Commission hopes that when there has been sufficient time for the full implications of the report to be digested and considered, the benefits flowing from the recommendations will become apparent.

the australian chamber of manufactures' alternative proposal. The Australian Chamber of Manufactures ('ACM') has put forward another proposal for product liability laws which present an 'alternative' to the recommendations of the Australian and Victorian Law Reform Commissions. The Business Council of Australia and other business groups had already put forward one business-oriented alternative proposal, commented in detail in the report (Appendix E). ACM claims to represent a wide range of Australian manufacturers. However, its submission appears to be based on information gained from 17 extremely large manufacturers, virtually all of which appear to be owned or controlled by corporations outside Australia. The position of small business does not appear to be represented. ACM accepts the deficiencies in existing law identified by the Commissions, but contends that 'the move to a new system is only justified where there is clear evidence of the breakdown of the existing system'. The ACM proposal not only rejects the Commissions' proposals, but also advocates the repeal of the Trade Practices Act 1974 (Cth), Pt V, Div 2A, and its replacement by laws based on the idea of negligence, rather than 'strict' contractual-type liability.

areas of agreement. However, there are many points on which the ACM proposal agrees with the Commissions' report:

- uniform national laws
- significant reform of the existing Australian law governing compensation for loss or damage resulting from unsafe or defective goods
- international agreements, such as the Vienna Sales Convention (which does not apply to consumer transactions), should prevail over domestic laws to the extent of any inconsistency
- the proposed law should not apply where the loss or damage is personal injury, disease or death suffered in the workplace where benefits are payable under a workers compensation law
- compensation should be available to as wide as possible a range of persons, without limitation or caps on the amount of damages awarded except those applying under the present law
- the new laws should replace existing laws

- there should be a 'state of the art defence' (though the views of the Commissions and the ACM on its scope and content vary)
- the law should not depend on administrative machinery for enforcement
- it should be a defence if the person injured voluntarily assumed the risk
- damages should be apportioned if the person injured failed to take reasonable care for his or her own safety
- account should be taken of the position of 'learned intermediaries'
- businesses should be able to contract out of the operation of the proposed rules
- there should be a knowledge-based limitation period of 3 years, with power to the court to extend this in appropriate cases
- retailers should remain liable if the only remedy sought is a refund of the price or the repair or replacement of the goods.

major differences. The major differences between the proposals in the Commissions' report and those of the ACM concern underlying policy, the basis of liability and the form of the laws.

- The ACM proposal suggests that the law may have 'developed in a pragmatic way, in response to specific needs or deficiencies at the relevant time'. The proposals seem to imply that any law reform should be by way of ad hoc, 'fire-fighting' responses to specific demands, rather than as a result of a thorough review of existing law. On the other hand, the Commissions'report formulated a basic policy approach, based on economic efficency.
- The ACM proposal is for a 'codification' of contract law, based on the existing implied terms and the law of negligence only to 'consumer' goods. However, earlier papers published by the ALRC draw attention to the difficulties of classifying goods in this way. Some goods, including salt, motor cars, methylated spirits, personal computers, power tools and refrigerators are ordinarily and commonly used for personal and household purposes, but are also used widely for industrial and commercial purposes.
- ACM argues that, because the implied terms of 'fitness for purpose' and 'merchantable quality' have been accepted for a long time in commercial law, they should continue to be the basis of the law, including the law applying to 'consumer' goods. The Commissions in their report, and the Law Commissions of England and Scotland and the New South Wales LRC, have all criticised those terms on the basis that they are incapable of precise definition and, in difficult cases whether or not goods comply with the required standards can only be determined *after* they have caused loss or damage, by a court, which has before it expert evidence and evidence of the plaintiff's loss or damage.
- The Commission's report identified a number of specific problems with the law of negligence. However, the ACM's proposal preserves it as the basis of liability. It would repeal the Trade Practices Act 1974 (Cth), Pt V, Div 2A, and replace it with laws firmly based on the idea of negligence.

- The Commissions' report argued that it is exceedingly difficult for a person injured by something goods have done, who is not a party to any contract for the supply of those goods, to identify a defendant who may have been negligent. Under the ACM proposals, however, the plaintiff would have to identify some person involved in the manufacture and supply of goods on the basis that that person had broken a duty of care.

- ACM acknowledges that the Commission's proposals would minimise litigation costs. One way in which this would be achieved would be by reducing the number of parties. Most of the respondents to the ACM survey said that they wanted a 'two-tier' system, as recommended by the Commissions, but that they did not want a 'primary' or 'representative' defendant.

- ACM proposes that it should be a 'complete' defence

> . . . where the state of scientific or technical knowledge reasonably available in the particular industry at the time the goods were manufactured or supplied were not such that the person could have been aware of, or discovered, that the goods were likely to cause loss or damage.

  The Commission's report noted that a defence in those terms would discourage both product innovation and development, and research into improved product safety, as no business could afford to depart from accepted industry practice.

alternative dispute resolution. One significant point raised by ACM which is not discussed in Commissions' reports is that of Alternative Dispute Resolution. This matter is curently the subject of a reference to the NSWLRC. It relates to the procedure for recovering compensation, rather than the right to compensation. Non-curial methods may, in some cases, be appropriate for determining an entitlement to or the amount of compensation. By prohibiting the enforcement of arbitration clauses in certain consumer transactions, at least two States have acknowledged that economic inequality may disadvantage the weaker party even more in informal or non-curial dispute-settlement than it does in court proceedings. □

regulating the insurance industry

The 1980 ALRC report *Insurance Agents and Brokers* (ALRC 16) was implemented by the federal government. It contained recommendations for an Australia-wide code for insurance agents and brokers.

Five years have passed since the Insurance (Agents and Brokers) Act 1984 was introduced and the *Australian Fianancial Revew* (AFR) recently reviewed progress to date. Commenting in an article in the *AFR* on 17 October 1989, Mr John Unkles, Executive Director of the National Insurance Brokers Association said:

> The first federal legislation controlling the conduct of insurance brokers in Australia has been a success. . . the effort has been worthwhile.

The AFR article continued:

> The exercise has achieved its objectives at less cost to the independents of brokers and freedom of choice for consumers than many early participants in the debate fear.
>
> The number of insurance broker failures has dropped substantially and the public still has access to a wide range of broker services at national and local level.